**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

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| **IN RE: REALPAGE, INC., RENTAL SOFTWARE ANTITRUST LITIGATION (NO. II)** | **Case No. 3:23-MD-3071**<br>**MDL No. 3071**<br><br>**This Document Relates to:**<br>**ALL CASES**<br><br>**Chief Judge Waverly D. Crenshaw, Jr.** |

# DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS MULTIFAMILY PLAINTIFFS' FIRST AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

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Plaintiffs' Opposition lays bare the implausible theory on which Plaintiffs built their case. Acknowledging the paucity of allegations against the vast majority of Defendants, Plaintiffs reframe the purported conspiracy as little, if anything, more than the "use of RealPage's RMS" by "any" Lessor Defendant. ECF 388 ("Opp.") at 27–28. In other words, Plaintiffs now claim that any company that agrees *with RealPage* to use one of its three revenue management products—a group comprising *hundreds* of companies throughout the country—"necessarily" becomes a member of a nationwide conspiracy to fix prices (*id.* at 27) regardless of which product it uses, much less when or where, and regardless of whether there was an agreement with its competitors to do anything. ECF 385 ("LRO Opp.") at 1. Plaintiffs cite no case in the Sherman Act's history finding a "conspiracy" on similar facts or anything remotely close. The Court should dismiss.

## I. ARGUMENT

### A. Plaintiffs' Group Pleading Allegations of Conspiracy Fail

Plaintiffs concede that their Complaint makes no specific allegations about all but a few of the 48 Lessor Defendants—indeed more than 30 Lessor Defendants are mentioned only once in the "Parties" section and never again. ECF 342-2. That alone requires dismissal of Plaintiffs' claims. Plaintiffs attempt to excuse this fatal infirmity by claiming the Complaint "connects each Defendant to the conspiracy, *through each Lessor Defendant's use of RealPage's RMS*." Opp. at 27 (emphasis added). At bottom, Plaintiffs' theory is that *any* company's use of *any* RealPage RMS product constitutes conspiracy.[1] But Plaintiffs offer no allegations about specific Lessor Defendants' use of RealPage's products that would support their implausible theory; in fact, they

[1] *See* Opp. at 28 ("any Lessor's use of" any RealPage revenue management product "demonstrates participation in" the alleged conspiracy); *id.* at 26 ("by virtue of each Lessor Defendants' use of" any of the three RealPage revenue management products, each Defendant "became a member of the conspiracy").

argue those facts are irrelevant. According to Plaintiffs, it does not matter whether a Lessor Defendant used the software "more actively" than others or for different periods of time, used different RealPage products from those used by other Lessor Defendants, "took different steps to implement" the alleged agreement, shared varying types and amounts of information with RealPage, or employed internal rather than external advisors to operate the software. *Id.* at 18 & n.12; LRO Opp. at 1. It does not even matter whether a lessor has been named as a defendant, since Plaintiffs plead that all "other RealPage RMS users" are "unnamed co-conspirators . . . with whom Defendants are jointly and severally liable." Opp. at 13 n.9 (citing MC ¶ 91).

Plaintiffs' Complaint does not state an antitrust claim. Allegations that each Lessor Defendant joined the conspiracy based solely on its independent *vertical* agreement with RealPage are insufficient as a matter of law to plead a plausible *horizontal* conspiracy to fix prices, much less a "conscious commitment" by *each* Lessor Defendant to such conspiracy. *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 907 (6th Cir. 2009). *Travel Agent* rejected allegations just like those Plaintiffs make here. *Id.* at 905. The Sixth Circuit held that the plaintiffs there (i) did not "aver facts sufficient" to connect defendants to the alleged conspiracy where they did not appear in the body of the complaint and (ii) could not rely on group pleading regarding "defendants" or "defendants' executives" to meet their burden. *Id.* The same holds here.

Plaintiffs claim the Complaint "explicitly details, at length, why any Lessor's use of RealPage's RMS products to set prices demonstrates participation in the anticompetitive conspiracy" (Opp. at 28), yet they cite no allegations containing those details. While they rely heavily upon the notion that the adoption of RealPage's software coincided with alleged strategy changes, they do not allege when or how any Lessor Defendant began using any of RealPage's RMS products, much less when or how each purportedly *agreed with the others* to do so—let alone

when and how they agreed to *fix prices*. The failure to allege these critical facts is fatal. *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 (6th Cir. 2008) (affirming dismissal of antitrust complaint for failing to connect each defendant to alleged conspiracy). Plaintiffs cannot survive dismissal merely by pointing to (i) RealPage's marketing campaigns (MC ¶¶ 119, 181); (ii) RealPage's interactions with a few of its clients (MC ¶¶ 125–37); (iii) a handful of Lessor Defendants' *internal* pricing decisions (MC ¶¶ 151–52); and (iv) alleged average "rent growth" *across the entire industry*, without specificity to the Lessor Defendants (MC ¶¶ 200–10, Figs. 11–15). None of these allegations plead a *horizontal* agreement.

Plaintiffs' naked allegation that each Lessor Defendant agreed "to remove itself as an independent decision center and to instead delegate pricing authority to RealPage" (*see* Opp. at 2, 17 n.12, 25) is not only conclusory, but also refuted by the Complaint's factual allegations conceding that Lessor Defendants *maintain* independent discretion over pricing and routinely reject RealPage pricing recommendations. MC ¶ 170 (alleging some Lessor Defendants have "low acceptance rate[s]"); MC ¶¶ 5, 129 (alleging other Lessor Defendants accept "up to" 80–90% of RealPage pricing recommendations; meaning they reject at least 10–20% of recommendations).

Plaintiffs' cases confirm the Complaint's defects. For example, in *Iowa Public Emps.' Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 340 F. Supp. 3d 285 (S.D.N.Y. 2018), the court found that the plaintiffs had "allege[d] each [d]efendant's participation *separately*," through dozens of paragraphs identifying, for example, when each defendant joined the conspiracy, the specific actions each took, and the "specific employees by name who held themselves out as representing the interests of their employers." *Id.* at 317 (emphasis added). By contrast, Plaintiffs do not reference a single employee for all but a few Defendants, much less allege specific actions by anyone in furtherance of an agreement. Plaintiffs instead improperly rely on group pleading.

Plaintiffs try to conceal these defects by analogizing their claims to those in *Interstate Circuit*, *Inc. v. United States*, 306 U.S. 208 (1939), *Toys "R" Us, Inc. v. FTC* ("*TRU*"), 221 F.3d 928 (7th Cir. 2000), and *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015). Opp. at 9–11. But in those cases the alleged conspiracies brought together virtually all of the (few) competitors in the relevant markets—eight film distributors in *Interstate Circuit*, seven toy manufacturers in *TRU*, and five publishers in *Apple*. Those few competitors purportedly were organized by powerful "ringmaster[s]"—hubs that supposedly were able to secure compliance by either threatening to impose or offering to solve looming "mortal threats." *TRU*, 221 F.3d at 930–31, 934; *Apple*, 791 F.3d at 317 n.16; *Interstate Circuit*, 306 U.S. at 215–17 & n.2. By the Complaint's own allegations, RealPage has no similar power and, regardless, could hardly enlist and deliver up "all" or virtually all competing lessors.[2] This case thus "stands in stark contrast to the hub-and-spoke conspiracies found in *Interstate Circuit* and *Toys 'R' Us*," in which only a few competitors were alleged to have conspired, they did so under a hub that wielded power over them, and "each firm's motivation to enter into the vertical agreement was contingent on *all* of its competitors' [sic] doing the same." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 333 n.30 (3d Cir. 2010) (emphasis added). And whereas the agreements in *Interstate Circuit*, 306 U.S. at 231, and *TRU*, 221 F.3d at 938, were unaccompanied by any remotely procompetitive business activity, here Plaintiffs do not dispute RealPage software's numerous efficiencies. ECF 341 ("Mem.") at 16.

**B. Plaintiffs Have Not Alleged Direct Evidence of an Agreement**

Plaintiffs claim to allege "direct evidence" of an agreement, but direct evidence must be

[2] Plaintiffs concede that the vast majority of lessors do not use RealPage software. *See, e.g.*, MC ¶ 113 (in 2022 RealPage priced "4 million rental units"); ¶ 213 ("22 million investment-grade units in the country"). These lessors could undercut supracompetitive prices and the conspiracy would fail, as Plaintiffs admit. Mem. at 25–27; MC ¶ 97.

"tantamount to an acknowledgement of guilt" and therefore "requires *no inferences* to establish the proposition or conclusion being asserted." *Hyland v. Homeservices of Am., Inc.*, 771 F.3d 310, 318 (6th Cir. 2014) (emphasis added). The Complaint does not offer anything close.

Plaintiffs claim their direct evidence consists of allegations that: (i) RealPage provides at least one product to each Lessor Defendant and the products are similar; (ii) some Lessor Defendants use Pricing Advisors, while others use their own employees to perform similar functions; (iii) online "user groups" purportedly permit information exchanges among Lessor Defendants; (iv) some unspecified individual Lessor Defendants choose mostly, but not always, to follow RealPage's price recommendations; and (v) a property manager not named as a defendant and with no identified geography allegedly made the vague statement that "RealPage RMS 'helps us work together.'" Opp. at 12–13 (emphasis deleted). But none of this is direct evidence because it does not *explicitly*—i.e., without resort to inferences—acknowledge a horizontal *agreement* among hundreds of lessors to use RealPage RMS as a pretext for price-fixing. *Hyland*, 771 F.3d at 318 (direct evidence is "explicit").[3]

### C. Plaintiffs Have Not Alleged Circumstantial Evidence of an Agreement

#### i. Plaintiffs Do Not Allege Parallel Conduct

Plaintiffs insist they allege "parallel conduct," but the only actions they allege are the purported "widespread adoption of RealPage's RMS" and a supposed shift in strategies from "heads in beds" to "price-over-volume." Opp. at 16. Those wholly conclusory allegations do not reflect parallel conduct because they do not allege a "pattern of uniform business conduct" that makes an inference of collusion more plausible. *Travel Agent*, 583 F.3d at 903.

[3] Unlike *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 220 (3d Cir. 2008), in which truck dealers allegedly admitted to "gentleman's agreements" not to compete on price and territory (*see* Opp. at 14), the Complaint contains no remotely comparable acknowledgments.

*First*, the alleged price increases on which Plaintiffs principally rely do not constitute parallel conduct as a matter of law. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1197 (9th Cir. 2015) (alleged industry-wide average retail price increase for guitars and amplifiers insufficient to suggest collusion). Were it otherwise, Plaintiffs would establish "parallel conduct" in every case alleging that prices have increased across an industry. More is required—as Plaintiffs' own cases show. Unlike the plaintiffs in the cases they cite,[4] Plaintiffs do not allege *any* specific parallel pricing (or supply reductions) by any *Lessor Defendants*. They instead allege that market prices increased across several cherry-picked cities generally, not just for Lessor Defendants but also for the many other lessors who do not use any RealPage RMS product. MC ¶¶ 21, 191–210. At most, Plaintiffs' generalized pricing allegations suggest that any price increases by Lessor Defendants were consistent with rising *market* prices during the relevant period. Plaintiffs' superficial analyses offer no insight into *Lessor Defendants'* prices (or vacancies), nor do they show any connection between such pricing and RealPage's RMS products.

*Second*, Lessor Defendants' "adoption of RealPage's RMS" is far from parallel. As the Complaint acknowledges, not only did Lessor Defendants use three different RealPage RMS products, their respective uses of those products began at different times. YieldStar has been in use since at least 2002 when RealPage purchased it, and RealPage purportedly began in 2004 to "use that software to drive higher average rents." MC ¶ 101. Plaintiffs omit when LRO was released but admit that it predates 2017 when RealPage acquired it, and their own cited evidence

[4] *See, e.g.*, *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 626–30 (E.D. Penn. 2010) (alleging "near-parallel price movements" in same month); *In re Diisocyanates Antitrust Litig.*, 2020 WL 1140244, at *3 (W.D. Penn. Mar. 9, 2020) (alleging "coordinated parallel conduct, price increases, plant closures and supply disruptions" and communications "prior to pricing announcements"); *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 190–91 (2d Cir. 2012) (defendants ceased dealing with plaintiff within three days of each other).

indicates LRO already "provided revenue management services for over 1.5 million apartments" at that time. *Id.* ¶ 106 & n.61. Plaintiffs allege that RealPage released the third RMS solution, AI Revenue Management, years later in 2020. *Id.* ¶ 15. Plaintiffs are silent on when each—or *any*—Lessor Defendant adopted any of these tools or even which ones each adopted; but they do not dispute that Lessor Defendants began doing so at very different times during the last *20-plus years*. Plaintiffs are likewise silent on when or how each—or *any*—Lessor Defendant supposedly shifted to a "price-over-volume strategy," especially for those with "a low acceptance rate of RealPage's pricing recommendations." *Id.* ¶ 170. Plaintiffs' claim that they do not have to show "simultaneous action" is a red herring. Opp. at 16–17. They allege *no* specific actions by each Lessor Defendant, let alone actions within a similar timeframe. What they do allege is *not* parallel conduct, in stark contrast to the cases Plaintiffs cite.[5]

**ii. Plaintiffs' Alleged Plus Factors Do Not Evince Any Conspiracy**

Contrary to Plaintiffs' assertion regarding the pleading standard (Opp. at 20), the Sixth Circuit made clear just last year that a plaintiff must plausibly allege "sufficient circumstantial evidence tending to exclude the possibility of independent conduct." *Hobart-Mayfield, Inc. v. Nat'l Op. Comm. on Standards for Athletic Equip.*, 48 F.4th 656, 664 (6th Cir. 2022); *see also C.S. Sewell, M.D. P.C. v. Amerigroup Tenn., Inc.*, 2018 WL 6591429, at *4 (M.D. Tenn. Dec. 14, 2018) (Crenshaw, J.) (dismissing where allegations did not "negate the likelihood of independent action"). Individually or together, Plaintiffs' alleged plus-factors do not supply the "factual matter" needed to infer a conspiracy. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

[5] *See, e.g.*, *Interstate Circuit*, 306 U.S. at 221–22 (defendants imposed minimum price after receiving same letter from supplier demanding minimum price); *Apple*, 791 F.3d at 306–07 (within a two-week period, Apple negotiated and entered into agreements with book publishers); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 420 (4th Cir. 2015) (defendants met and in a "matter of months" refused to work with plaintiff).

**Actions Against Self-Interest.** Plaintiffs attempt to recast their allegation that Lessor Defendants "restrict[ed] supply"—i.e. allowed units to remain vacant—"while maintaining higher rental prices" as conduct against self-interest. *See* Opp. at 21; MC ¶¶ 211–36. The Complaint is bereft of plausible factual allegations supporting this theory. Plaintiffs make no allegations about any particular Lessor Defendant setting a higher price for a particular unit and letting it sit vacant. And sources the Complaint cites repeatedly say exactly the opposite. *See, e.g.*, ECF 342-1 at 1 ("The goal of 'revenue optimization' is to set rents at the optimum balance *to ensure units do not sit vacant due to being overpriced* . . . .") (emphasis added).

But even assuming *arguendo* that Plaintiffs adequately pleaded this theory, that conduct is independently rational. *See In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 49–50 (9th Cir. 2022) (it is "economically rational" to "focus on profitability" over "market share"). Defendants' supposed shift is not "so unusual" that "no reasonable firm" would have done it absent conspiracy. *In re Travel Agent Comm'n Antitrust Litig.,* 2007 WL 3171675, at *11 (N.D. Ohio Oct. 29, 2007), *aff'd*, 583 F.3d 896 (6th Cir. 2009). Plaintiffs claim it is "only economically rational" for a lessor to accept RealPage's alleged "high" price recommendations, and allow units to sit vacant, if it knows other lessors will do the same. Opp. at 22. But by alleging that users reject recommended prices at least 20% of the time, the Complaint concedes no Lessor Defendant plausibly expected others to do that. *Supra* at 3. Even if the Complaint alleged otherwise, "mutual awareness" of a competitor's "anticipated reactions" is not collusion because "two firms may arrive at identical decisions independently" due to "similar market pressures." *Musical Instruments*, 798 F.3d at 1193 (affirming dismissal).

**Motive to Conspire.** Plaintiffs concede that Lessor Defendants' supposed motive to conspire—i.e., to "increase revenues beyond what could be achieved in a competitive market"—

is "economically rational." Opp. at 25. For good reason: the "common motive for increased profits always exists" and does not evince conspiracy. *Musical Instruments*, 798 F.3d at 1194 n.8.

**Opportunities to Conspire.** Plaintiffs' conjecture that Defendants *could have* conspired through meetings, online user groups, and trade associations (Opp. at 22–23) does not imply collusion. *See Midwest Auto Auction, Inc. v. McNeal*, 2012 WL 3478647, at *10 (E.D. Mich. Aug. 14, 2012) (alleged "'[n]umerous opportunities' [to collude] are not sufficient" to infer conspiracy).

**Information Sharing.** Plaintiffs do not deny that their information-sharing allegations overwhelmingly describe individual Lessor Defendants' provision of information to RealPage rather than exchanges among Lessor Defendants. Opp. at 23. Bilateral information-sharing between each "spoke" and the "hub" does *not* establish the necessary "rim"—the agreement among the spokes.[6] Mem. at 17; *see, e.g.*, *Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 988–89, 1003 (N.D. Cal. 2020).

Plaintiffs cite a case in which an intermediary allegedly acted as a "conduit" for information exchanges between conspirators (Opp. at 23), but there the conduit purportedly directly transmitted defendant-specific data to facilitate a separate conspiracy. *In re Local TV Advert. Antitrust Litig.*, 2020 WL 6557665 (N.D. Ill. Nov. 6, 2020). Far from alleging that RealPage facilitated the exchange of identifiable, competitor-specific data, Plaintiffs recognize that RealPage's products provide only *aggregated* data. Mem. at 19; *e.g.*, MC ¶ 115 & Fig. 5; *see also* Opp. at 23 (conceding "RealPage did not necessarily provide the raw data"). They now suggest that RealPage discloses competitor-specific data during quarterly "PTM" meetings (Opp. at 23), but the Complaint acknowledges that RealPage shared only "pooled" or "blended" "market data" showing "overall

[6] Plaintiffs seek to distinguish *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010) by citing an inapposite portion of the opinion dealing with a hub's solicitation of "exclusive-dealing agreements" from the spokes. *Id.* at 332–33; *see* Opp. at 24.

market performance" at those meetings. MC ¶¶ 125–33. And even if certain Lessor Defendants had one-off contacts (Opp. at 23), limited exchanges do not imply a years-long, *per se* illegal price-fixing agreement. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

**Market Structure.** Even if viewed with other allegations (Opp. at 25–26), Plaintiffs' market-structure allegations "are simply descriptions of the market, not allegations of anything that the defendants did." *Erie Cnty. v. Morton Salt, Inc.*, 702 F.3d 860, 870 (6th Cir. 2012).[7]

**D. The Rule of Reason Applies**

Even if Plaintiffs had plausibly alleged a horizontal agreement, the rule of reason would apply.[8] The *per se* rule applies only when alleged conduct "clearly and unquestionably falls within one of the handful of categories that have been collectively deemed *per se* anticompetitive." *Expert Masonry, Inc. v. Boone Cnty.*, 440 F.3d 336, 343–44 (6th Cir. 2006). Courts do not apply the *per se* rule where the alleged agreement involves novel technology. *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1008 (7th Cir. 2012) ("[it] is a bad idea to subject a novel way of doing business . . . to per se treatment"); *see also FTC v. Qualcomm Inc.*, 969 F.3d 974, 990–91 (9th Cir. 2020). Plaintiffs cite no case where a court has *evaluated* competitors' use of price-recommending algorithms, much less declared it *per se* unlawful. With no judicial experience with this novel theory, the "automatic presumption in favor of the rule of reason standard" applies. *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 273 (6th Cir. 2014) (internal quotation marks omitted).

Plaintiffs' response is that this is "a garden-variety price-fixing case," and the software

[7] Plaintiffs' argument regarding *Jones v. Micron Technology Inc.* fails—plaintiffs there relied on more than market structure and the Complaint was still dismissed. 400 F. Supp. 3d 897, 916–22 (N.D. Cal. 2019) (alleging market conditions, opportunities to collude, public statements, actions against self-interest, deviation from past behavior, and historical conduct).

[8] The applicability of the rule of reason can be determined at the motion to dismiss stage because it is a "question of legal characterization." *Techmatic, Inc. v. Plating Specialists, Inc.*, 2022 WL 16542106, at *13 (M.D. Tenn. Oct. 28, 2022).

constitutes a "naked" restraint to which the *per se* rule applies. Opp. at 8, 9. But calling the use of software "price fixing" does not make it so. The Complaint acknowledges why it is in each Defendant's unilateral interest to use RealPage's RMS—by Plaintiffs' own allegations, then, it is not a naked restraint. *See* Mem. at 16. Nor is it correct, as Plaintiffs contend, that an alleged restraint's "purpose and effect . . . dictate the mode of analysis" regardless of judicial experience with it. Opp. at 7. The cases Plaintiffs cite for this assertion involved the types of explicit horizontal agreements courts have deemed *per se* illegal.[9]

Further, Plaintiffs do not dispute that the rule of reason applies to both (i) any agreement to share information, and (ii) the vertical agreements between RealPage and Lessor Defendants. Even if the Plaintiffs' conclusory allegation of horizontal collusion via vertical agreements was credited—and it cannot be (*see* Mem. at 18–20, 23–25)—it would still be subject to the rule of reason. "To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate [a horizontal] cartel, it . . . would need to be held unlawful under the rule of reason." *Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007); *see also Toledo Mack*, 530 F.3d at 225 ("The rule of reason analysis applies even when . . . the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers."). Nor do *Interstate Circuit*, *TRU*, and *Apple* suggest otherwise. Notwithstanding Plaintiffs' argument (Opp. at 11), *Interstate Circuit* was not even a *per se* case. 306 U.S. at 230–32; *see Royal Drug Co. v. Grp. Life & Health Ins. Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984) (the "analysis [in *Interstate Circuit*] was predicated upon

[9] *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) (horizontal agreement to set "floor" for gasoline prices); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648–49 (1980) (agreement to fix credit terms); *Apple*, 791 F.3d at 327 (horizontal boycott); *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 771 (2d Cir. 2016) (agreement to fix interest rates); *Ariz. v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 339 (1982) (agreement to maximum fees charged).

the rule of reason"). The Supreme Court in *Leegin* cited *TRU* as an example of a vertical arrangement that is subject to the rule of reason. 551 U.S. at 893–94. And the court in *Apple* applied the *per se* rule to direct allegations of a "horizontal agreement that Apple organized among the Publisher Defendants," *not* to Apple's "vertical" agreements with each Publisher. *Apple*, 791 F.3d at 323.

**i. Plaintiffs Fail to Allege a Plausible Relevant Market**

Plaintiffs claim that Defendants challenged Plaintiffs' alleged national market "solely" because Plaintiffs also allege regional submarkets. Opp. at 33. This is wrong; the national market is implausible on its face because, as Plaintiffs allege, "commuting distance to a place of work or school is a significant (if not the primary) geographic constraint on where a person chooses to live." MC ¶ 246. Based on Plaintiffs' own allegations (and common sense), a California renter could not plausibly rent housing in Florida as an alternative. *See Tampa Elec. Co. v. Nashville Coal Co*., 365 U.S. 320, 327 (1961) (a relevant geographic market is the "area in which the seller operates, and to which the purchaser *can practicably turn for supplies*." (emphasis added)). Plaintiffs' contention that its "national market for the lease of multifamily residential real estate satisfies [the SSNIP] test" fails for the same reason. Opp. at 33. As the Sixth Circuit has explained, under that test the relevant geographic market is limited to the region "*where the buyer could turn for supplies if prices increased*." *In re Se. Milk*, 739 F.3d at 282 (emphasis added).

Similarly, it is not plausible that a renter would consider housing that is in the same MSA but 85 miles away from where she works to be a reasonable substitute. *See id.* That Courts have found MSAs to be relevant geographic markets *in non-housing contexts* does not prove otherwise. Plaintiffs cite two cases about health insurance, for example, where plaintiffs pleaded facts showing that MSAs were areas in which patients could "practicably turn" for alternative

healthcare providers—a much different issue than *housing*. *See* Opp. at 34 n.21.

Finally, Plaintiffs are wrong that an overbroad market definition is not deficient. Opp. at 34. Courts dismiss claims premised on overbroad markets. *E.g.*, *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1121 (9th Cir. 2018) (affirming dismissal where product and geographic markets were "not natural," "artificial," and "contorted to meet their litigation needs."); *Uretek USA, Inc. v. Applied Polymerics, Inc.*, 2011 WL 6029964, at *5 (E.D. Va. Dec. 5, 2011); *Debjo Sales, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 2015 WL 1969380, at *6 (D.N.J. Apr. 29, 2015).

**ii. Plaintiffs Have Not Alleged Market Power**

Plaintiffs claim they have pleaded both direct and indirect allegations of market power, but neither is true. To plead direct allegations, Plaintiffs must allege that a *Lessor Defendant* could and did charge prices "above a competitive price." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2288 (2018). But Plaintiffs' scattered allegations about prices and vacancies are based on *average data* for *all* units (whether leased by a Lessor Defendant or not). *E.g.*, MC ¶¶ 196–210, 252; *id.* ¶ 10 Fig. 1; Mem. at 35–36. They reveal nothing about *Lessor Defendants'* prices or vacancies, much less how those compared to other competitors. *Cf. Musical Instruments*, 798 F.3d at 1197. At most, Plaintiffs allege that average prices rose year over year. But the mere "occurrence of a price increase does not in itself permit a rational inference of . . . supracompetitive pricing." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993).

Plaintiffs' other assertions of direct effects fare no better. They allege RealPage markets its software as helping users increase *revenue* (Opp. at 31–32), but revenue is not price; the software can increase revenue by decreasing vacancy, as the FAQ document states. ECF 342-1 at 1. And these allegations reveal nothing about how Lessor Defendants' prices compared to competitors'. Similarly, Plaintiffs cite a witness who claims RealPage recommended price

increases to a Lessor Defendant at an undisclosed property (Opp. at 31 (citing MC ¶ 11)), but an allegation that a single Defendant received such a recommendation cannot suffice to show that the 48 Lessor Defendants charged supracompetitive prices in any of the alleged submarkets.

Nor do Plaintiffs plead indirect evidence of market power by alleging the minimum share often required as a threshold for market power: 30% in any alleged submarket. Plaintiffs argue the Court can *infer* such a share based on RealPage's supposed dominance in the "revenue management software space" coupled with Plaintiffs' allegation that 53% to 81% of lessors in the alleged submarkets use some form of revenue management software (not specific to RealPage)—but this math does not work. *Id.* at 36. While Plaintiffs allege that RealPage has "over 31,700 clients" that manage units accounting for "nearly 90% of the U.S. market" (MC ¶¶ 113, 213), this is RealPage's *entire client base* across *multiple unrelated products and services* (MC ¶ 100)—not RealPage's *RMS* customers. With respect to RealPage *RMS products*, Plaintiffs allege that in 2022 they were used to "set the price for more than four million rental units" (MC ¶ 113), compared to "a total of 22 million investment-grade units in the country" (MC ¶ 213)—*less than 20%.*

**E. Plaintiffs Lack Antitrust Standing**

Plaintiffs concede they lack antitrust standing. Despite contending they "could not be reasonably expected to know, at the pleading stage," whether *any* rent they paid to *any* Lessor Defendant was set using RealPage RMS products (Opp. at 36–37) Plaintiffs concede that Lessor Defendants depart from the recommendations *at least* 10–20% of the time (MC ¶¶ 5, 129) and that some Lessor Defendants do so frequently (MC ¶ 170). They do not dispute that this may have occurred for *all* the rental rates they paid. Nor do they dispute that RealPage may have suggested, and a Lessor Defendant adopted, rent *decreases*. Plaintiffs thus fail to plead facts demonstrating antitrust standing. Mem. at 36 (citing cases). While they speculate that "[i]t is plausible that even

the overridden prices that the Lessors charged were inflated" and that there was "marketwide distortion of prices," (Opp. at 38), they cite no allegations for these new theories, nor could they.

**F. Plaintiffs' State-Law Claims Fail**

To save their state-law claims, Plaintiffs mischaracterize their claims and the law. They argue Pennsylvania's UTPCPL "*explicitly* creates a private right of action for antitrust claims" (Opp. at 38), but antitrust-based claims are not among the methods of "unfair competition" the statute proscribes. *See* 73 Pa. Stat. §§ 201-2, 201-3; *In re HIV Antitrust Litig.*, 2023 WL 3006572, at *3–4 (N.D. Cal. Apr. 18, 2023); *In re K-Dur Antitrust Litig.*, 2008 WL 2660780, at *4 (D.N.J. Feb. 28, 2008). Next Plaintiffs argue claims they *did not make* should save ones they did. They concede Georgia's antitrust statute has no private right of action, but argue Georgia recognizes a common-law tort for restraint of trade, which *they do not plead*. Opp. at 38; MC ¶ 434. They do not contest that Massachusetts's antitrust law (Chapter 93) *does not apply* to real property and instead argue that a *different* statute (Chapter 93A) does—but again Plaintiffs do not plead a claim under Chapter 93A. Opp. at 38; MC ¶ 444. Plaintiffs agree that Tennessee's antitrust law applies only to goods and not services, but offer that a lease for an apartment *might* be a "good." They are wrong. *See Trails End Campground, LLC v. Brimstone Recreation, LLC*, 2015 WL 388313, at *11 (Tenn. App. 2015) (TTPA only applies to tangible goods).

Finally, Plaintiffs say they have standing to assert claims under the laws of states where they neither lived nor were supposedly injured, and ask this Court to rely on a decision it made *before* the Sixth Circuit decided *Fox v. Saginaw County*, 67 F.4th 284 (6th Cir. 2023). But *Fox* held that named representatives cannot rely on absent class members for standing; they must have standing for each claim they bring. *Id.* at 295; *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("[P]laintiffs must demonstrate standing for each claim that they press . . . .").

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 31, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered on the CM/ECF system.

DATED this 31st day of July, 2023.

/s/ *Jay Srinivasan*
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